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SENATE BILL 1254
By Kyle

HOUSE BILL 1109
By McMillan

AN ACT to amend Tennessee Code Annotated, Title 29 and Title 56, to enact the “Managed Care Liability Act” relative to managed care entities.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 29, is amended by adding Sections 2 through 5 of this act as a new, appropriately designated chapter.

SECTION 2. The title of this act is, and may be cited as, the “Managed Care Liability Act”.

SECTION 3. As used in this act:

(1) "Appropriate and medically necessary" means the recognized standard of acceptable healthcare services as determined by physicians and other healthcare providers in accordance with the prevailing practices and standards of the medical profession and community.

(2) "Enrollee" means an individual who is enrolled in or insured by a healthcare plan, including covered dependents.

(3) "Healthcare plan" means any plan whereby any person or entity undertakes to provide, arrange for, pay for or reimburse any part of the cost of any healthcare services.

(4) "Healthcare provider" means any person or entity performing services regulated pursuant to Tennessee Code Annotated, title 63 or title 68, chapter 11.

(5) "Healthcare treatment decision" means a determination as to when, or if, medical services are actually provided by the healthcare plan or a decision which affects the quality of diagnosis, care or treatment provided to enrollees of the healthcare plan.

(6) "Health insurer" means an authorized insurance company that issues policies of accident and sickness insurance.

(7) "Health maintenance organization" means an entity regulated pursuant to Tennessee Code Annotated, title 56, chapter 32, part 2.

(8) "Managed care entity" means a health insurer, health maintenance organization or any other entity that delivers, administers or assumes risk for healthcare services with systems or techniques to control or influence the quality, accessibility, utilization or costs and prices of such services to a defined enrollee population. Provided, however, "managed care entity" does not include:

(A) An employer purchasing healthcare coverage, (on behalf of its employees or the employees of one or more subsidiaries or affiliated corporations of the employer), from an independent contractor-managed care entity;

(B) An employer group purchasing organization purchasing healthcare coverage, on behalf of its member-employers, from an independent contractor-managed care entity;

(C) An employer having, for the benefit of its employees or the employees of one or more subsidiaries or affiliated corporations of the employer, a self-funded healthcare plan administered by an independent contractor-managed care entity;

(D) An employee association or other membership organization having, for the benefit of its members, a self-funded healthcare plan administered by an independent contractor-managed care entity;

(E) A pharmacy licensed by the state board of pharmacy; or

(F) The state of Tennessee.

(9) "Ordinary and reasonable care" means the recognized standard of acceptable care that a managed care entity of ordinary prudence would use under the same or similar circumstances. In the case of a person who is an employee, agent, ostensible agent, or representative of a managed care entity, "ordinary and reasonable care" means the recognized standard of acceptable care that a person of ordinary prudence in the same profession, specialty or area of practice would use in the same or similar circumstances.

(10) "Physician" means a person or a professional corporation or association rendering healthcare services regulated pursuant to Tennessee Code Annotated,title 63, chapter 6, part 2, or title 63, chapter 9.

SECTION 4.

(a) A managed care entity has the duty to exercise ordinary and reasonable care when making healthcare treatment decisions and is liable for damages for an enrollee's harm proximately caused by the managed care entity's failure to exercise such ordinary and reasonable care.

(b) A managed care entity is also liable for damages for an enrollee's harm proximately caused by the healthcare treatment decisions made by the entity's:

(1) employees;

(2) agents;

(3) ostensible agents; or

(4) representatives;

who are acting on the entity's behalf and over whom the entity has the right to exercise influence or control or has actually exercised influence or control, which result in the failure to exercise ordinary and reasonable care.

(c) It shall be a defense to any action brought, pursuant to this act, against a managed care entity that:

(1) Neither the managed care entity nor its employees, agents, ostensible agents or representatives controlled, influenced or participated in the healthcare treatment decision; and

(2) The managed care entity did not deny or delay payment for any treatment prescribed or recommended by a provider to the enrollee.

(d) The provisions of this act may not be construed to impose an obligation on the managed care entity to provide to an enrollee any treatment that is not covered by the healthcare plan.

(e) The provisions of this act may not be construed to impose liability on:

(1) An employer purchasing healthcare coverage, on behalf of its employees or the employees of one or more subsidiaries or affiliated corporations of the employer, from an independent contractor-managed care entity;

(2) An employer group purchasing organization purchasing healthcare coverage, on behalf of its member-employers, from an independent contractor-managed care entity;

(3) An employer having, for the benefit of its employees or the employees of one or more subsidiaries or affiliated corporations of the employer, a self-funded healthcare plan administered by an independent contractor-managed care entity;

(4) An employee association or other membership organization having, for the benefit of its members, a self-funded healthcare plan administered by an independent contractor-managed care entity;

(4) A pharmacy licensed by the state board of pharmacy; or

(5) The state of Tennessee.

(f) A managed care entity may not remove a physician or healthcare provider from its plan or refuse to renew the physician or healthcare provider with its plan for

advocating on behalf of an enrollee for appropriate and medically necessary healthcare for the enrollee.

(g) In an action brought pursuant to this act, a managed care entity may not assert any defense violative of the provisions of Tennessee Code Annotated, sections 56-2-124 or 71-5-136.

(h) In an action brought pursuant to this act, no provision of statute or rule, prohibiting a managed care entity from practicing medicine or being licensed to practice medicine may be asserted as a defense.

(i) In an action brought pursuant to this act, a finding that a physician or other healthcare provider is an employee, agent, ostensible agent, or representative of a managed care entity may not be based solely on proof that the name of such physician or provider appears in a listing of approved physicians or healthcare providers made available to enrollees under a healthcare plan.

(j) The provisions of this act do not apply to workers' compensation insurance coverage as set forth in Tennessee Code Annotated, Title 50, Chapter 6.

SECTION 5.

(a) A person may not maintain a cause of action under this act unless the affected enrollee or the enrollee's representative:

(1) Has exhausted internal grievance review and independent review procedures available pursuant to Tennessee Code Annotated, section 56-32-210 and section 56-32-227; or, alternatively,

(2) Before bringing the action:

(A) Gives written notice of the claim in accordance with the requirements of subsection (b); and

(B) Agrees to submit the claim for mediation or other nonbinding alternative dispute resolution.

(b) The notice required by subsection (a)(2)(A) must be delivered to the managed care entity at least thirty (30) days prior to filing a cause of action pursuant to this act.

(c) If, within fourteen (14) days of receiving such notice, the managed care entity requests mediation or other nonbinding alternative dispute resolution, then the enrollee or the enrollee's representative must submit the claim for such mediation or dispute resolution. However, if the managed care entity does not timely request such mediation or dispute resolution, then the enrollee or the enrollee's representative may proceed to file the cause of action following expiration of the thirty (30) day period required by subsection (b).

(d) Subject to subsection (e), if the enrollee or the enrollee's representative does not comply with subsection (a) prior to filing an action pursuant to this act, then such action shall not be dismissed by the court, but the court may, in its discretion, order the parties to submit to internal grievance review and independent review procedures or, alternatively, to mediation or other nonbinding alternative dispute resolution and may abate the action for a period of not to exceed thirty (30) days for such purposes. Such orders of the court shall be the sole remedy available to a managed care entity complaining of noncompliance with subsection (a).

(e) The enrollee or the enrollee's representative is not required to comply with subsection (a) and no abatement or other order pursuant to subsection (d) for failure to comply shall be imposed if the enrollee or the enrollee's representative files a pleading alleging in substance that:

(1) Harm to the enrollee has already occurred because of the conduct of the managed care entity or because of an act or omission of an employee, agent, ostensible agent, or representative of such entity for whose conduct the entity is liable under this act; and

(2) Internal grievance review and independent review procedures or mediation or other nonbinding alternative dispute resolution would not be beneficial to the enrollee.

However, if the court, upon motion by the managed care entity, finds after hearing that such pleading was not made in good faith or is untrue, then the court may enter an order pursuant to subsection (d).

(f) Notwithstanding any provision of law to the contrary, if the enrollee or the enrollee's representative seeks to exhaust internal grievance review and independent review procedures or provides notice, pursuant to subsection (a)(2)(A), before the statute of limitations applicable to a claim against a managed care entity has expired, then the limitations period shall not expire prior to:

(1) The thirtieth (30th) day following exhaustion of such internal grievance review and independent review procedures;

(2) The thirtieth (30th) day following completion of mediation or other nonbinding alternative dispute resolution requested by the managed care entity; or

(3) In the absence of internal grievance review and independent review and mediation or other nonbinding alternative dispute resolution, the forty-fourth (44th) day following the date on which the enrollee or the enrollee's representative gives notice under subsection (a)(2)(A).

(g) The provisions of this act may not be construed to prohibit an enrollee from pursuing other appropriate remedies, including injunctive relief, a declaratory judgment, or relief available under law, if the requirement of exhausting procedures for utilization review or independent review places the enrollee's health in serious jeopardy.

SECTION 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 7. This act shall take effect July 1, 2005, the public welfare requiring it.